IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 1160 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MOHD.TAHIR MOHD.ARIF BAKASWALA

Versus

STATE OF GUJARAT

Appearance:

1. Special Criminal Application No. 1160 of 2003

MR HASHIM QURESHI for Petitioner No. 1

MR PR ABICHANDANI, APP for Respondents.

CORAM : HON'BLE MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 20/12/2003

ORAL JUDGEMENT

Leave to amend. Mr. Qureshi, learned advocate

appearing for the petitioner seeks permission to delete prayer (A) contained in para. 8 of the petition. Permission granted. Said relief clause stands deleted.

Rule. Mr. P.R. Abichandani, Ld. APP waives service of rule for respondents. At the request of the learned Advocates for the parties, matter is taken up for final hearing today.

3. This petition is filed challenging the impugned order which is passed by the learned Sessions Judge, Surat in the capacity of Special Judge below Exh. 1 in Criminal Misc. Application No. 935 of 2003 (Athwa Lines Police Station C.R. No. I - 111/2002). The said Criminal Misc. Application was tendered with a request to quash the report submitted by the Investigating Officer for addition of section 3 of the Prevention of Terrorism Act, 2002 (for short 'POTA') in the said FIR. In the application it has been stated that considering the allegations contained in the FIR, even prima-facie no offence under the provisions of POTA was made out.

3.1. The learned Sessions Judge, Surat, who heard the said application, decided that considering the facts alleged in the FIR and the material gathered by the investigating agency, case under POTA was very much present and acts of the accused prima-facie appeared to be of anti-national and in the nature of threats to the unity, integrity and security of nation. The learned Judge, therefore, vide order dated 27/8/2003 dismissed the said application and further directed that the case be transferred to City Civil & Sessions Court at Ahmedabad.

4. It appears that prior to the constitution of Special Court under the provisions of section 23 of the POTA, the Sessions Court at Surat was invested with the power of dealing with the cases arising under the provisions of POTA as transitional provisions. However, later on the State Government vide notification dated 27/6/2003 constituted a Special POTA Court at Ahmedabad for trying all the cases arising under the provisions of POTA. With the establishment of the Special Court by virtue of provision of section 35 of the POTA, the different Courts appointed as Special Courts as a measure of transitional provision were required to transfer pending proceedings before it to the Special POTA Court at Ahmedabad.

5. Mr. Qureshi, learned advocate for the petitioner has raised only one submission before this Court to the

effect that with the constitution of the Special Court in June 2003 the learned Sessions Judge at Surat ceased to have power to deal with any case under the provisions of POTA. In other words, according to him, the impugned order passed by the learned Sessions Judge was without jurisdiction.

5.1. As against that, Mr. P.R. Abichandani, Ld. APP has vehemently opposed this application and has submitted that the said application was preferred by the present petitioner himself and even at the time of hearing of the said application no contention with regard to the want of jurisdiction was raised and, therefore, the petitioner at this stage cannot be permitted to raise this contention. He has further submitted that even in the event of this Court setting aside the impugned order, it will have no adverse effect on the inclusion of offence u/S. 3 of the POTA in the FIR by the investigating agency and it will not prevent the concerned Special Court from framing appropriate charge keeping in view the said provision.

6. It is true that the application came to be submitted by the petitioner himself for quashing the report of the Investigating Officer to add section 3 of the POTA in the FIR. It also appears that the learned advocates appearing for the petitioner argued the mater extensively. However, the question is that when the Special Court under the provisions of section 23 of the POTA came to be established by the State Government, was it within the jurisdiction of the learned Sessions Judge, Surat to entertain the application and decide the same on its merits? Answer would be no, especially in view of section 35 of the POTA, which prescribes that all the proceedings which are pending before the different Courts as transitional provision, stand transferred to Special Court upon its establishment. The present order is dated 27/8/2003. Obviously by that time the Special Court at Ahmedabad had been established vide aforesaid notification. In that view of the matter, the learned Sessions Judge could not have passed any order below the said application. In fact on that very day, for the same reason the learned Sessions Judge, Surat has not decided another application submitted on behalf of the Investigating Officer and it had been referred to the Special Court for deciding the same. It is, therefore, very obvious that the learned Sessions Court was aware of the creation of the Special Court at Ahmedabad. In that view of the matter, the impugned order clearly appears to be without jurisdiction and it is, therefore, required to be quashed and set aside and accordingly it is ordered to be quashed and set aside. This order is passed by this

Court purely on technical ground and it will not have any effect on the merits of the case. It will also not come in the way of concerned Special Court in framing charge for offences under POTA against the accused.

In the result, the application is allowed accordingly. Rule made absolute.

[AKSHAY H. MEHTA, J.]

* Pansala.